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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 684

HELEN MARY ROBINSON, ADMINISTRATRIX,
Petitioner,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

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RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that the petition for certiorari be dismissed, or in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

The decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas, to which the petition for certiorari is directed, is reported as *Robinson vs. Gulf, Colorado and Santa Fe Ry. Co.*, 325 S.W. 2d 432. That opinion contains a concise summary of the facts as well as the jury findings.

PLAINTIFF'S STATEMENT

In the Petition for Certiorari (page 5-8) plaintiff purports to state the facts. We cannot accept such statement as being more than partially accurate. If it had been labled "Plaintiff's Allegations" we would accept it with the statement that such allegations were not supported by the evidence and were negatived by the jury verdict. We cannot even accept plaintiff's approach that in spite of a clear verdict for the Railroad on all issues of liability, the evidence must be construed most favorable to the plaintiff. Nor can we accept the repeated statement (Petition for Writ of Error, page 4, page 12, page 13, page 15, page 18), that the plaintiff in this case was denied a trial by jury. Plaintiff had a very favorable jury trial and the jury found against her. The Court of Civil Appeals statement of facts and of the jury findings are sufficient, we think, to demonstrate that the plaintiff has not made either a fair or accurate statement of the facts. We, therefore, feel that it is necessary to make a brief summary of the evidence:

STATEMENT OF FACTS

The plaintiff's husband, Grady Robinson, was fireman on the southbound Santa Fe Texas Chief, and both he and engineer J. H. Estes were killed on August 12, 1957, when that passenger train hit a Tarrant County asphalt truck at a wide open country crossing at about 12:45 P.M. The country road involved is called both Avondale School Road and Blue Mound Road. It has very little traffic on it, and there

is not a tree, a bush, a house, a barn or any other character of object along the road or on the railroad right-of-way which in any way interferes with the view of an approaching train. The crossing is so wide open that no one had ever heard of an accident at this crossing before, and there is positive testimony that there had not been one there for at least 25 years. It was a gravel road, and the County had decided to "hot top" it, but had given no notice of its intention to the Santa Fe, nor had any work been done near the track prior to the accident. The asphalt truck was spreading (or shooting) asphalt on the gravel road, and the noise of the machinery kept the truck driver and his helper from hearing the whistle of the train, and because of their attention to their work, they failed to look for the train, which was plainly in view. The collision occurred, and the fireman and the engineer were both killed from the hot asphalt. The driver of the truck was also killed, and the helper was badly burned.

With 20 or more witnesses and a week's trial, the case was submitted to the jury, in accordance with Texas practice, on special issues. Seven different issues on the railway company's negligence were submitted, and the jury answered in each case "no negligence." The jury also found no negligence on the part of the plaintiff's deceased husband. The jury found that the sole cause of the accident was the conduct of the County employees.

The jury, fulfilling its pre-eminent role in FELA cases, found that there was no negligence of the em-

ployer which played any part, however small, in the death which is the subject matter of this suit, and that the sole proximate cause of the accident and the death of Grady Robinson was the conduct of the County employees. Plaintiff conceded in the Texas courts that the jury's findings were supported by the evidence.

The Texas Court of Civil Appeals in effect held that the proofs justified with reason the jury's conclusion that there was no employer negligence which played a part, however small, in producing the death of Grady Robinson.

The Court of Civil Appeals further held that the failure of the Trial Court to submit additional grounds of negligence "did not deprive the plaintiff of any substantive rights" and that there was no error in the case which "probably did cause the rendition of an improper judgment in the case." The plaintiff applied for writ of error to the Texas Supreme Court, which was refused, and her motion for rehearing was overruled. Under the heading, "On the Merits," there is a more detailed statement of the jury findings.

JURISDICTION

Jurisdiction is denied. It is conceded that this is an FELA case and that both the Trial Court and the Court of Civil Appeals recognized it as such. It is recognized that plaintiff's petition was filed in time from a final judgment of a state court. Plaintiff had a jury trial in very favorable atmosphere and got a

jury verdict that her husband's death was solely caused by Tarrant County and that there was no negligence on the part of the railroad. We deny that the affirmance of such a judgment of the Trial Court gives the United States Supreme Court jurisdiction.

Daulton vs. Southern Pac. Co., 352 U.S. 1005, 1 L.Ed. 2d 549, 77 S.Ct. 564;

Burch vs. Reading Co., 353 U.S. 965, 1 L.Ed. 2d 914, 77 S.Ct. 1049;

Brinkley vs. Pennsylvania R. Co., 358 U.S. 865, 3 L.Ed. 2d 97, 79 S.Ct. 94.

Where the plaintiff has had a fair chance to get at the defendant under the Court's charge, failure to submit additional issues or grounds creates no federal question.

Houston Oil Co. vs. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140.

In addition, the plaintiff was not entitled to the particular requested issues under Texas practice, and certainly a Texas court's application of Texas rules of procedure to a Texas state court proceeding creates no federal question.

Black vs. Cutter Laboratories, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824.

Lastly, petitioner predicates jurisdiction solely on 28 U. S. C., Section 1254(3), (see petition for writ of error, page 3). This article (28 U. S. C., Section 1254) applies solely to the Federal Circuit Court of

Appeals. It gives no basis for jurisdiction of a petition for certiorari addressed to a state court.

It is, therefore, respectfully submitted that certiorari should be denied, or in the alternative the petition should be dismissed.

QUESTIONS PRESENTED

1. Jurisdiction as above set out.

2. Whether a clear jury verdict for the defendant is accorded the same finality as a clear jury verdict for the plaintiff in an FELA case.

3. Whether a clear jury verdict for the defendant in an FELA case will be set aside for unsubstantial alleged procedural errors.

4. Whether a State court should reverse the trial court's judgment in an FELA case based on a jury verdict, for claimed errors which, if they existed, were waived under state practice, or for asserted errors which do not constitute reversible error under state practice.

CONSTITUTIONAL QUESTION

In the Petition for Certiorari (page 4), plaintiff makes the bland assertion that the Seventh Amendment to the Constitution of the United States guarantees trial by jury in state courts. Since the plaintiff had a jury trial, and since the jury had twenty-seven different special issues submitted to it which it answered, the question of whether the Seventh Amendment does or does not apply to state court actions is

utterly immaterial. If it were not immaterial, it would raise some very interesting theoretical questions. For example, since the specific language of the Seventh Amendment says it applies only to the federal courts, and the Supreme Court of the United States has uniformly so held, can Congress by enactment of a federal statute (the FELA in this case) amend the Constitution and make it apply to state courts? If the Seventh Amendment applies to this case, then there having been a jury trial in this case, and the jury having returned a clear verdict for the defendant, does the Constitution guarantee that neither the Texas Court of Civil Appeals nor the Supreme Court of the United States will re-examine same other "than according to the rules of the common law"? If the Seventh Amendment is applicable to this case, wouldn't it automatically require the denial of the Petition for Certiorari in view of the jury verdict for the defendant? Since there was a jury trial, all of these questions are immaterial, and since the petitioner has made no attempt to weave the Seventh Amendment into the brief, and only makes a bald assertion, we need make no further statement.

ON THE MERITS

The Court of Civil Appeals opinion contains a statement of the pleadings of the parties and a summary of the evidence. The Santa Fe's brief in the Court of Civil Appeals, pages 2-22, contains a detailed statement of the evidence with references to the record. In view of the factual statement in the Court of Civil Appeals, and in view of the fact that the

plaintiff in the Trial Court has not and does not now question the sufficiency of the evidence to support the jury's findings, we do not believe that a detailed statement of the evidence is essential in this brief.

We do think, however, that this Court, in view of its numerous holdings that the jury is the final arbiter in this type of case, would be interested in the actual jury verdict. The case was submitted to the jury (Tr. p. 64) in the standard Texas procedure of special issues with definitions of ordinary care, negligence, proximate cause, proper lookout and sole proximate cause. The plaintiffs did not object to any of the issues or definitions.

The jury found (beginning Tr. p. 67):

"SPECIAL ISSUE NO. 1.

"Do you find from a preponderance of the evidence that the defendant railway company was negligent in authorizing and directing its engineers to operate locomotives at the point of the collision here involved at rates of speed as high as 84 miles per hour?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 2, being the proximate cause issue, was not answered.

"SPECIAL ISSUE NO. 3.

"Do you find from a preponderance of the evidence that the failure of the defendant to mark said railway crossing in question in some manner so as to warn the public of the fact that trains travelling across the same travelled

up to speeds as high as 84 miles an hour was negligence?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 4 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 5.

"Do you find from a preponderance of the evidence that the defendant's engineer was negligent in operating the locomotive at a rate of speed of 84 miles per hour at the time of the collision here involved?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 6 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 7.

"Do you find from a preponderance of the evidence that the defendant's engineer as he approached the crossing here involved failed to keep a proper lookout, as that term has been defined for you herein, for vehicles using the crossing on the occasion here involved?

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 8 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 9.

"Do you find from a preponderance of the evidence that the defendant's engineer upon the

occasion in question failed to timely sound the whistle on the locomotive he was operating as he approached the crossing in question?

"By the term 'timely sound the whistle' as used in this question is meant the sounding of the whistle at such time and distance prior to the time the train went over the crossing here involved as an ordinarily prudent person would have sounded the same under the same or similar circumstances.

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 10 was a proximate cause issue and was not answered.

"SPECIAL ISSUE NO. 11.

"Do you find from a preponderance of the evidence that the defendant's engineer upon the occasion in question failed to timely apply the brakes on the train he was operating as he approached the crossing in question?

"By the term 'timely apply the brakes' as used in this question is meant the applying of the brakes on the train at such time and distance prior to the time the train went over the crossing here involved as an ordinarily prudent person would have applied the same under the same or similar circumstances.

"Answer 'yes' or 'no.'

"Answer: No."

Special Issue No. 12 was a proximate cause issue and was not answered.

Special Issues 13, 14, 15 and 16 related to damages.

Special Issues 17, 18, 19, 20 and 21 related to contributory negligence on the part of Grady Robinson, which were answered in the negative.

"SPECIAL ISSUE NO. 22.

"Do you find from a preponderance of the evidence that the collision in question was not an unavoidable accident (as that term is defined for you below), as far as Grady Robinson and the Santa Fe Railway Company were concerned?

"You are instructed that the term 'unavoidable accident' as used in the above question means an event which occurs without any negligence, if any, on the part of the Santa Fe Railway Company, acting by and through its agents, servants and employees (other than Grady Robinson), and without any negligence on the part of Grady Robinson, which proximately contributed thereto.

"You will answer, 'It was the result of an unavoidable accident,' or 'It was not the result of an unavoidable accident,' as you may find.

"Answer: It was the result of an unavoidable accident."

Special Issue No. 23: This was a reduction of damages, which was not answered, because no negligence was found.

"SPECIAL ISSUE NO. 24.

"Do you find from a preponderance of the evidence that the driver of the county truck on the occasion here in question failed to maintain a proper lookout (as that term is defined for you in this charge) for approaching trains?

"You will answer 'He did fail' or 'He did not

fail,' as you may find.

"Answer: He did fail."

"SPECIAL ISSUE NO. 25.

"If you have answered Special Issue No. 24 above 'He did fail,' and only in that event, then answer this question:

"Do you find from a preponderance of the evidence that such failure, if any you have found, as inquired about in special issue No. 24 above, was the sole proximate cause of the death of Grady Robinson?

"Answer 'yes' or 'no.'

"Answer: Yes."

"SPECIAL ISSUE NO. 26.

"Do you find from a preponderance of the evidence that the driver of the truck failed to properly listen for approaching trains?

"By the term 'properly listen,' as used in the above question is meant the kind of listening that a person of ordinary prudence would have done under the same or similar circumstances.

"Answer 'He did fail' or 'he did not fail.'

"Answer: He did fail."

"SPECIAL ISSUE NO. 27.

"If you have answered special issue No. 26 above 'He did fail,' and only in that event, then answer this question:

"Do you find from a preponderance of the evidence that such failure, if any you have found, as inquired about in special issue No. 26 above, was the sole proximate cause of the death of Grady Robinson?

"Answer 'yes' or 'no.'

"Answer: No."

"SPECIAL ISSUE NO. 28.

"Do you find from a preponderance of the evidence that the driving of the asphalt truck on the track on the occasion in question was not the sole proximate cause of the death of Grady Robinson?

"Answer 'It was the sole proximate cause' or 'It was not the sole proximate cause.'

"Answer: It was the sole proximate cause."

The only special issue which would require any explanation for a non-Texas jurist is Special Issue No. 22, which is called the unavoidable accident issue but actually is, as the definition indicates, the submission of the broad issue of whether there was any negligence (whether specified in the preceding issues or not) on the part of the railroad or the employee which caused the accident. The jury found that there was no negligence on the part of either the railroad or the employee by finding it was an unavoidable accident.

This explanation has been made by the Texas courts frequently. Applicable thereto, we take the following quotation from *Herrera vs. Zinberg* (Civ. App.—Writ refused, N.R.E.) 287 S.W. 2d 695, quoting from page 696:

"The definition of unavoidable accident is broad. It embraces all and every negligence of both plaintiff and defendants and nowhere limits the negligence and proximate cause to those things specially inquired about in the charge. The inquiry about unavoidable accident, as defined, turned the jury completely loose to deter-

> mine from all the evidence and the total situation, whether the plaintiff or the defendants or both or neither did or omitted to do anything amounting to negligence."

The same holding was made in a Jones Act case in which an injured seaman who had the verdict of the jury against him sought reversal on the failure to submit additional issues. We quote from *Guthrie vs. Sinclair Refining Co.* (Civ.App.-Writ refused, N.R.E.) 320 S.W. 2d 396 (certiorari denied November 9, 1959, No. 365) quoting from page 403:

> "Moreover, the jury exonerated both appellant and appellee of all negligence in finding that the occurrence in question was the result of an unavoidable accident. The jury was instructed in connection with the submission of the issue as to whether the accident was or was not an unavoidable accident, that
>
> > 'By the term "unavoidable accident", as used herein, is meant the unforeseen and unanticipated happening of an event occurring without either the Defendant or the Plaintiff being guilty of negligence that proximately caused the accident in question, if any.'
>
> "The finding of the jury negated negligence in all particulars."

Therefore, the plaintiff in this case not only had a submission of every specific ground of negligence that the fertile mind of the plaintiff's lawyer and the trial judge could conceive, but the plaintiff had an opportunity to have the jury make a finding of negligence on the part of the railroad even if unspecified

in the charge or unspecified in the pleadings. The plaintiff had a shotgun issue then, as well as the specific issues.

There is no way to construe the opinions of this Court in the last ten years other than as saying and holding that the jury verdict in FELA cases must be accorded finality. For example, we refer to:

Rogers vs. Missouri Pacific R. Co., 352 U.S. 500, 1 L.Ed. 2d 493, 77 S.Ct. 443;
Coray vs. Southern Pacific Co., 335 U.S. 520, 93 L.Ed. 208, 69 S.Ct. 275;
Tiller vs. Atlantic Coast Line R. Co., 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444;
Lavender vs. Kurn, 327 U.S. 645, 90 L.Ed. 916, 66 S.Ct. 740;
Webb vs. Illinois Central R. Co., 352 U.S. 512, 1 L.Ed. 2d 503, 77 S.Ct. 451;
Wilkerson vs. McCarthy, 336 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413.

From the last case we take the following quotation (quoting 336 U.S. p. 61):

> "But the issue of negligence is for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances."

In this case the Court defines negligence as the failure to do what an ordinarily prudent person would have done under the same or similar circumstances. Therefore, we say the jury verdict for the

defendant in this case is entitled to the same finality as this Court has accorded to verdicts in favor of plaintiffs. This is particularly true since the plaintiff in this case does not attack the sufficiency of the evidence to support the jury's findings.

Plaintiff's application for certiorari is predicated upon alleged error in failing to submit additional grounds of negligence by submitting additional requested special issues.

This Court has further said many times that the finality of a jury verdict in an FELA case should not be disturbed for unsubstantial errors in procedure.

Arnold vs. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 1 L.Ed. 889, 77 S.Ct. 840;
Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 1 L.Ed. 2d 493, 77 S.Ct. 443;
Webb vs. Illinois Central R. Co., 352 U.S. 512; 1 L.Ed. 503, 77 S.Ct. 809.

Certainly, if the jury verdict had been for the plaintiff in this case and the defendant, Santa Fe, had presented the same error, or the same type of error, seeking a reversal and new trial, the Supreme Court of the United States would certainly not even consider a Petition for Certiorari on such grounds seriously, nor if it granted certiorari, would it reverse and remand on such grounds. The Texas Courts, contrary to petitioner's statements, have in many instances applied the same rules and the same standards which were applied in this case to affirm the trial court's judgment to jury verdicts for the plain-

tiff from which the defendant appealed. Even where the Texas Courts have found procedural errors in a plaintiff's jury verdict, reversible error has been denied. See for example the FELA case of:

Thompson vs. Robbins, (Tex.S.Ct.) 304 S.W. 2d 111.

We say, therefore, that grounds for certiorari are not shown in this case. We say that positively and unequivocally without the necessity of the analysis (which is made hereafter) showing the plaintiff's additional issues were encompassed in the issues submitted to the jury, and that under Texas practice even if plaintiff were otherwise entitled to such issues (which she was not), she has failed to show reversible error under such Texas practice. To conclude this portion, we merely paraphrase the holding of the Court of Civil Appeals in this case by saying:

> "The Trial Court did not deprive the plaintiff of any substantive rights, and therefore there was no error which probably caused the rendition of an improper judgment in the case."

NO REVERSIBLE ERROR UNDER TEXAS PRACTICE

Should this Court make a detailed study of the record in this case, it will discover quite promptly that there actually was only one ground of negligence on the part of the railroad in this case. That was the speed of the train. The train was allowed to run 90 miles an hour and was actually running 84 miles an hour at this particular location. The plaintiff had two classes of negligence. One was the negligence of the engineer Estes, all of which claims were submitted to the jury and answered adversely to the plaintiff. Second were the claims of negligence on the part of the railroad company in various respects. This second class of negligence on the part of the railroad company all are predicated on the speed of the train. Besides the particular allegations that the railroad was negligent in permitting the train to run so fast at this location or over this crossing, the other claims are all based on the speed of the train, too. No argument plaintiff makes as to negligence on the part of the railroad (other than the negligence of the engineer) is based on anything other than speed. Merely to briefly illustrate, why does plaintiff say that her husband did not have a safe place to work? Because the train ran so fast. Why does the plaintiff say that this wide open country crossing, which was seldom used and which had never had a prior accident, needed additional warnings? Because the train ran so fast. Why does plaintiff contend that a louder whistle was needed? Because the train ran so fast. Why does the plaintiff contend that more braking

power ought to have been on the train? Because the train ran so fast. This could go through every contention plaintiff makes, and if the same question is asked, you get the same answer.

No matter whether you slice it, cube it, pickle it, or soak it in wine, the heart of plaintiff's contention that Robinson did not have a safe place to work is the speed of the train. Another way to demonstrate that that is the only basis of the contention is to take each argument which plaintiff makes and in the light of the undisputed facts substitute for 84 miles an hour a speed of 20 or 30 miles per hour. If that is done, not even the plaintiff would contend that the result is unsafe place to work.

The Court submitted the speed of the train to the jury twice, and the jury twice found that it was not negligence to operate the train at 84 miles an hour over this particular crossing, under the conditions existing. Stated another way, what is the difference between an issue which reads, "In view of the conditions existing at this particular crossing, including the lack of warning devices, and in view of the kind of brakes, the kind of horn, the kind of engineer, and other factors relating to the train itself, was it negligence to require the operation at speeds up to 84 miles an hour?" and an issue which reads, "In view of the speed of the train permitted and required by the railroad company and the other factors existing, was it negligence on the part of the railroad not to have an additional warning, or additional brakes, or additional whistles?

We realize that this Court does not reach questions such as that above presented, but the plaintiff got so much the better of the Trial Court's rulings and so much the better of the submission to the jury, that human nature being what it is, we cannot fail to resent any contention or implication that the Trial Court dealt with the plaintiff unfairly.

Repeating again, the jury verdict which we have heretofore quoted, was clearly one for the defendant, and was a finding, both specifically and in general, of no negligence on the part of the Railroad Company, and a finding that the sole cause of the death of Robinson was the conduct of the County employees. The question presented is not the same as though the Trial Court had instructed a verdict for the defendant. The question before the Court of Civil Appeals was whether, under the applicable rules of procedure, the claimed errors existed, and if they exist, whether they required the reversal for a new trial. We quote from the Court of Civil Appeals opinion, 325 S.W. 2d 432, at page 435:

> "(2) Like other cases tried in the state courts, F. E. L. A. cases will not be reversed unless the error complained of be of such nature that it "probably did cause the rendition of an improper judgment in the case," as contemplated by Rules 434 and 503, Texas Rules of Civil Procedure. Thompson v. Robbins, Tex., 304 S.W. 2d 111.
>
> (3) We do not intend to hold, and do not hold, that it is improper in a F. E. L. A. case to submit a general issue on unsafe place to work and special issues on specific acts or omissions. We

merely hold, under the whole record in the case before us, that the trial court did not deprive plaintiff of any substantive rights by refusing to submit the general issue of unsafe place to work, having concluded that the special issues properly and adequately presented all plaintiff's grounds on which there was evidence of unsafe place to work to the jury."

Now, getting to the Texas procedural points, we will take them briefly and with only references to one or two of the applicable authorities in the interest of brevity.

First, the plaintiff alleged many grounds of negligence (e.g., competency of the engineer, additional brakes, additional whistles, failure to issue slow orders, etc.). Even if there were evidence to support such issues, the failure of the plaintiff to request the submission of such issues was a waiver thereof, under *Texas Rules of Civil Procedure, Rule* 279 (quoted in full in the appendix hereto). See, for example:

41-B *Tex. Jur.* Secs. 429, 431;

T. & N.O. R. Co. vs. Sturgeon, 142 Tex. 222, 177 S.W. 2d 264;

Johnson vs. Miller, 142 Tex. 228, 177 S.W. 2d 249;

Hicks vs. Harper, 134 Tex. 89, 132 S.W. 2d 579;

McCarver vs. City of Corpus Christi, 155 Tex. 153, 284 S.W. 2d 142.

Next, under the same *Texas Rules of Civil Procedure* (No. 279, quoted in the appendix), it is never

error to fail to submit the same basic issue twice. In other words, no party (plaintiff or defendant) is entitled to have different phases of the same issue submitted.

41-B *Tex. Jur.* Sec. 423, p. 535;

T. & N.O. R. Co. vs. Sturgeon, supra;

Solgaard vs. T. & N.O. R. Co., 149 Tex. 181, 229 S.W. 2d 777;

Smith & Conklin Bros. vs. Griffith, 153 Tex. 341, 268 S.W. 2d 124.

Plaintiff only complains of error by the Trial Court in failing to submit the general issue of unsafe place to work (see petition for certiorari, p. 3 & 4 and p. 11-19).

As we have heretofore pointed out (this brief, p. 14), the submission of Special Issue No. 22, there quoted, was a submission to the jury of the question of whether there was any negligence of any kind on the part of either the railroad company or Robinson. The jury answered no. Had the jury been of the opinion that there was any negligence on the part of the railroad, whether included in the special issues submitted or not, they would have answered the foregoing issue to the effect that there was negligence. They did not need to specify; they did not need to limit it to safe place to work, additional warnings, or incompetent engineer. They would have just found that there was negligence; but they did not. Therefore, the plaintiff had a submission of safe place to work (and every other ground of negligence sup-

ported by either the pleadings or the evidence) on the part of the railroad company, and the jury answered no. (See *Guthrie vs. Sinclair Refining Co.*, supra, in which this very point was decided in a Jones Act case, and in which certiorari was denied by this Court on November 9, 1959.)

Next, plaintiff cannot claim reversible error, under *Rule* 279, unless the requested issue is in substantially correct form. See:

41-B *Tex. Jur.*, Sec. 425, p. 543;

Harris vs. Lestie, 128 Tex. 81, 96 S.W. 2d 276;

Edmondson vs. Carroll, (Ft. Worth Court—Dism., Judgm. Cor.) 134 S.W. 2d 378;

Anderson vs. Broome (No writ history), 233 S.W. 2d 901;

Texas Gen. Ins. vs. McNeill (No writ history) 261 S.W. 2d 378;

Mitchell vs. Mills (Wr. N.R.E.), 264 S.W. 2d 749;

Cruse vs. Daniels (Wr. N.R.E.), 293 S.W. 2d 616;

Sunset Motor Lines vs. Blasingame (Wr. dism.), 245 S.W. 2d 288.

This rule precludes any error on plaintiff's requested shotgun issue of safe place to work, because under Texas practice the issues should be confined to the specific acts or omissions of negligence alleged.

Northeast Texas Motor Lines vs. Hodges, 138 Tex. 280, 158 S.W. 2d 487;

Triangle Cab Co. vs. Taylor, 144 Tex. 568, 192 S.W. 2d 143;

Sproles vs. Rosen, 126 Tex. 51, 84 S.W. 2d 1001;

Thompson vs. Robbins, 157 Tex. 463, 304 S.W. 2d 111;

Texas Employers' Ins. Co. vs. Frankum, 148 Tex. 95, 220 S.W. 2d 449.

Relating specifically to "safe place to work," we refer the Court to 41-B *Tex. Jur.* Sec. 452 p. 583:

> "The court should not submit in a single issue the defendant's negligence generally in failing to furnish a safe place to work, but should submit separately the issue as to the existence or non-existence of each of the various defects in the premises which it is claimed made the premises unsafe."

See also:

Ginther vs. Southwest Workover Co., (Civ. App.—no writ hist.) 286 S.W. 2d 291, p. 293;

Gulf States vs. Dillon, (Civ.App.—no writ hist.) 112 S.W. 2d 752, p. 754;

McDonald vs. Joske's (Civ.App. — no writ hist.) 268 S.W. 2d 475.

Therefore, under Texas practice plaintiff in this case, if there were error, has failed to preserve it, has waived it, and under Texas practice she is not entitled to reversal for these procedural matters.

Lastly, while it is totally unnecessary in reply to a petition for certiorari, we do not want any brief filed which would even impliedly admit that there was any evidence to support the submission of the additional grounds of negligence. The Court submitted many issues of negligence which were not supported by the evidence, and certainly plaintiff got more issues than she was entitled to. The plain facts of this case are that two good men, Engineer Estes and Fireman Robinson, were killed because of the County employees' gross negligence. They violated Article 6701d of the *Revised Civil Statutes*, and they violated every rule of common prudence. The County furnished no one to flag or help or warn them, and they made no effort to prevent the accident. Under the opinion of the majority in *Inman vs. Baltimore & Ohio R. Co.*, No. 36 decided December 14, 1959, appearing in 4 L.Ed. 2d 198 advance sheet, the Trial Court in this cause should have instructed a verdict for the defendant because Robinson was killed plainly and obviously by the acts of the County employees, not only the truck driver but the supervisor employees who failed to warn the railroad and failed to station anyone there to help them. The Trial Court, however, submitted this case to the jury just as the minority in *Inman* wanted it done, and the jury found that the sole cause of Robinson's death was the conduct of these County employees. The jury verdict in this case is the same as in *McDonald vs. Pennsylvania R. Co.* (3rd Cir.) 210 F.2d 524, and certainly in light of the jury verdict we should be justified in saying, as the Third Circuit did in that case, that Robinson was killed not

by the railroad but by the senseless indifference of the County employees.

SUMMARY

The respondent, Gulf, Colorado and Santa Fe Railway Company, says that a clean jury verdict in favor of the railroad company in an FELA case creates no federal question. The jury was right, the Trial Court was right, and the Texas Court of Civil Appeals was right, for many reasons not included in this reply. Summarizing the reasons here presented for a denial of certiorari:

(a) Jurisdiction is denied, because a jury verdict for the defendant in an FELA case creates no federal question, and neither the Trial Court nor the Court of Civil Appeals deprived the plaintiff of any substantive federal right. Where the plaintiff had seven opportunities to obtain a finding of negligence on the part of the railroad, and the jury answered each of such questions in the negative, failure to submit additional grounds presents no federal question.

(b) Jury verdicts in FELA cases, whether for the plaintiff or for the defendant, are not to be set aside by appellate courts on unsubstantial procedural points.

(c) On the merits, the plaintiff got everything she was entitled to, and more. She had submitted to the jury six particular grounds of negligence on the part of the defendant, and the jury answered all of them no. She had a shotgun issue of whether there

was any negligence on the part of the defendant causing the accident, and the jury answered that no. The evidence did not raise any ground of negligence other than the specific ones submitted, but if it did, she got her general submission, too.

(d) Plaintiff, having elected to file this suit in the State court, was bound by those rules of State practice which apply equally to all litigants. If there were any error (which there was not) in failing to submit additional issues, plaintiff has failed to preserve reversible error under Texas applicable rules of practice.

CONCLUSION

Plaintiff's husband was killed in a horrible accident while a fireman on the defendant's passenger train. After a more than fair jury trial, judgment was rendered against the plaintiff and in favor of the Santa Fe Railway, because the jury found that there was no negligence whatsoever on the part of the railway company and that the sole cause of the death of plaintiff's husband was the conduct of the County employees. We respectfully submit that such as case is not one for certiorari jurisdiction. We further submit that this Court, on a review of the record, would reach the same conclusion that the jury did, the Trial Court did, and that the Texas Court of Civil Appeals did.

WHEREFORE, premises considered, the respondent prays that certiorari be denied or dismissed.

Respectfully submitted,

Luther Hudson
c/o HUDSON, KELTNER, JORDAN & CUNNINGHAM
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Fort Worth 2, Texas

I certify that a copy of the foregoing respondent's reply to petition for writ of certiorari has been mailed on the 24 day of March, 1960, to petitioner's attorneys, as follows: to Akin & Vial, 1405 Mercantile Securities Building, Dallas 1, Texas; and to Cantey, Hanger, Johnson, Scarborough & Gooch, 1500 Sinclair Building, Fort Worth 2, Texas.

Of Counsel for Respondent

APPENDIX

Vernon's Annotated Texas Rules of Civil Procedure, Rule 279:

"Rule 279. Submission of Issues

"When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in treaspass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been

requested in writing and tendered by the party complaining of the judgment.

"Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party."